IN THE

# Supreme Court of the United States

APR 30 19
MICHAEL RODAK, JR.

October Term, 1973

No. 73-1639

ANTAR A. R. SULAIMAN and OVER 21 BOOK CLUB, INC.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

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No. ..... ....

ANTAR A. R. SULAIMAN and OVER 21 BOOK CLUB, INC.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

The Petitioners, Antar A. R. Sulaiman and Over 21 Book Club, Inc., respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 19, 1974.

## Opinion Below.

The opinion of the Court of Appeals is reported in 490 F.2d 78, and appears in Appendix "A" hereto.

## Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 19, 1974. A due and timely Petition for Rehearing and Petition for Rehearing *En Banc* was filed by Petitioners and denied by the Court of Appeals by Order entered on April 3, 1974.

A copy of the letter from the Clerk of the Court of Appeals advising Petitioners of the entry of the said Order appears as Appendix "B" hereto. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

**Questions Presented.**

1. Whether the provisions of Title 18 United States Code, §1461, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, were, prior to June 21, 1973, unconstitutionally vague, violating the First and Fifth Amendments, because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California,* 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged advertisements and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged advertisements and films appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labelled "unrealistic";

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged advertisements and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

(e) Prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under §1461.

2. Whether the Indictment herein in statutory language is fatally defective because it fails to inform Petitioners of the nature and cause of the accusations against them, in violation of the applicable provisions of the Sixth Amendment.

3. Whether the provisions of Title 18 United States Code, §1461, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, under a standard for judging *scienter* solely by alleged proof of knowledge that the material is "sexually oriented", abridge the freedoms of speech and press and arbitrarily deprive Petitioners of their liberty and property without due process of law, in violation of the First and Fifth Amendments.

4. Whether the provisions of Title 18 United States Code, §1461, as construed and applied by the trial court's instructions to the jury on the issue of *scienter*, which instructions were confusing, inconsistent and misleading, and permitted the jury to return verdicts of guilt based upon a standard for judging *scienter* which eliminated any requirement of guilty knowledge and intent, violate the provisions of the First and Fifth Amendments.

5. Whether the provisions of Title 18 United States Code, §1461, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, where the Indictment, trial and convictions of Petitioners were concededly governed only by

the standards for judging obscenity enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, and where the Government presented no evidence that the advertisements and films exceeded national community standards, appealed to prurient interest, or were utterly without redeeming social value, violate the free speech and press and due process provisions of the First and Fifth Amendments.

6. Whether the provisions of Title 18 United States Code, §1461, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, where the advertisements and films named in the Indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First and Fifth Amendments.

7. Whether the provisions of Title 18 United States Code, §1461, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, where the advertisements and films, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs* and *Miller* tests by the Court of Appeals, but not the jury abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioners of their liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the guarantees of the First and Fifth Amendments and Article I, §9.

**Constitutional and Statutory Provisions Involved.**

The pertinent provisions of the First, Fifth and Sixth Amendments, and Article I, §9 of the Constitution, and the pertinent provisions of 18 U.S.C. 1461 appear in Appendix "C" hereto.

**Statement.**

1. The ten-count Indictment herein, returned in the United States District Court for the Southern District of Florida on July 9, 1971, charged the Petitioners Antar A. R. Sulaiman and Over 21 Book Club, Inc., with violations of Title 18 United States Code §1461. The trial under the Indictment was conducted before the Honorable W. O. Mehrtens, United States District Judge, and a jury. On September 14, 1971, the jury returned verdicts of guilt against both Petitioners on all ten counts of the Indictment [R.T. 185-186].[1] Petitioner Sulaiman was sentenced to imprisonment for a period of two years as to each of the counts, to run concurrently. Petitioner Sulaiman also was fined the sum of $2,500.00 as to each ten counts for a total fine of $25,000.00 [R.T. 220-221]. The corporate Petitioner was fined the sum of $3,500.00 as to each ten counts for a total fine of $35,000.00 [R.T. 222-223]. Petitioner Sulaiman was enlarged on an appeal bond of $10,000.00.

2. Prior to trial, Petitioners moved to dismiss the Indictment [R.T. 140-142] on grounds, among others, that the provisions of 18 U.S.C. 1461, on their face and as construed and applied, violated the guarantees of the First, Fifth and Sixth Amendments, and that the In-

[1]The reference "R.T." is to the Appendix filed by Petitioners in the Court of Appeals.

dictment failed to inform Petitioners of the nature and cause of the accusations made against them. Petitioners alleged that the Indictment failed to set forth the essential elements of obscenity and failed to allege *scienter*. Petitioners also moved for a Bill of Particulars [R.T. 130-133] which sought, *inter alia*, to ascertain the meaning and essential elements of the term "obscene," and whether it was claimed that Petitioners knew the materials named in each count of the Indictment went substantially beyond customary limits of candor in the Nation as a whole and appealed to the prurient interest of the average person in the Nation as a whole. The Motion to dismiss was denied; the Motion for a Bill of Particulars was denied in all pertinent respects.

3. At trial, it was established that Postal Inspector Wolff, using various fictitious names, obtained the films and advertisements named in nine out of the ten counts of the Indictment [R.T. 24-38]. Wolff admitted that his investigation of Petitioners was undertaken at the request of a postal inspector in Los Angeles, California, Petitioners' place of business. The postal inspector in Los Angeles requested Wolff, in Miami, to make "test purchases" from the corporate Petitioner [R.T. 35].

During his investigation, Postal Inspector Wolff checked the Miami Postal Servicing Center to determine if there were any complaints against the corporate Petitioner relating to unsolicited mail. Wolff stated that he found only one complaint, that of one L. Younge, the addressee named in Count V of the Indictment [R.T. 32]. Marian Younge testified that she received at her home the advertisements referred to in Count V [R.T. 47-48]. The witness testified that after she received the material, she took it to the Post Office and filled out a

form requesting that her family be removed from Petitioners' mailing list [R.T. 50]. See, 39 U.S.C. 3008. On cross-examination, Petitioners were not permitted to elicit from the witness whether she or her family had received any further mailings from the Petitioners after she filed the request for a Prohibitory Order [R.T. 52-53].

On the issue of *scienter*, the Government adduced the testimony of Postal Inspector Richard Cuthbert, who accompanied a United States Marshal at the time of Petitioner Sulaiman's arrest on June 17, 1971. At the time of his arrest, Petitioner Sulaiman was sitting at a desk in one of the offices of the corporate Petitioner in North Hollywood [Los Angeles], California. Cuthbert observed Sulaiman seated at his desk in the process of opening mail addressed to the Over 21 Book Club. The witness also observed in an office connected to the office in which Sulaiman was sitting, a table containing approximately five boxes of two brochures, which the witness identified as being the same brochures contained in Government Exhibits 4 and 9 [R.T. 39-42]. It was stipulated that the Petitioner Over 21 Book Club, Inc. is a corporation of the State of California and that Petitioner Sulaiman was President of the corporation and, as of January 28, 1971, the sole director and officer of the corporation. It was also stipulated that the specific business purpose of the corporation is the mail order distribution of books and films; that Petitioner Sulaiman had signed an agreement to have a checking account in the name of the corporate Petitioner and that Petitioner Sulaiman had signed a receipt for the installation of a Pitney-Bowes Postal Meter, the installation receipt for which bore the same postal meter number as did the envelopes named in each count of the Indictment [R.T. 45-46].

After adducing the evidence described above, the Government rested. Other than the materials named in the Indictment, the Government adduced no evidence that the advertisements and films exceeded national community standards, appealed to the prurient interest of the average person in the Nation, or were utterly without redeeming social value. Petitioners moved for a judgment of acquittal on the ground that the evidence was insufficient on the elements of obscenity and *scienter* [R.T. 61-62]. The motion was denied.

Petitioner Sulaiman testified that he had been in the mail order business for a little over a year, and that he had conducted his business pursuant to the advice of counsel. The Petitioner stated that up until the time he was indicted, he had never received any notification from any of the postal authorities or anyone in Government that the authorities considered his material to be obscene [R.T. 64-65]. Petitioner Sulaiman further testified that he had purchased several books, magazines and films similar to the material named in the Indictment, at an open stand about three blocks away from the Courthouse. The books were titled "Swap Mates," "The Marriage Art," "The Talking Pussy," "Diary of a Sex Pot," "Rape" and "Animal Lust." The trial court refused to admit the materials into evidence, ruling that community acceptance had to be proven before the materials would be admissible [R.T. 67-76].

At the conclusion of all the evidence, Petitioners renewed their motion for judgment of acquittal on the same grounds raised earlier [R.T. 84]. The motion was denied.

4. The instructions of the trial court to the jury on the issue of obscenity encompassed the tripartite standards enunciated in *Roth-Memoirs* [R.T. 91-94]. With regard to *scienter*, the trial court's instructions to the jury, discussed in greater detail later, confusingly set forth both general and specific intent instructions and, as a result, permitted the jury to convict if the jury found that Petitioners' conduct "was done voluntarily and intentionally and not because of mistake or accident." [R.T. 96].

5. The Court of Appeals held that the provisions of 18 U.S.C. 1461 were not void for vagueness or overbreadth. Recognizing in a companion case[2] that "Defendants were convicted in what may be called a no-man's land" (490 F.2d at 75), the Court nevertheless held that *Miller* and its companion cases did not preclude application of the *Memoirs* standards to material involved in transactions occurring prior to the decision in *Miller*. However, to assure that no one is convicted under standards allegedly more restrictive than those in *Memoirs*, the Court decided that it would employ both the *Miller* and *Memoirs* definitions of obscenity. On this basis, the Court concluded that the advertisements and films involved herein are "within the legal parameters of obscenity."

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[2]*United States v. New Orleans Book Mart, Inc.*, 490 F.2d 73.

In rejecting Petitioners' constitutional challenges to the vagueness, prior to June 21, 1973, of §1461, the Court of Appeals relied upon its prior opinion in *United States v. Thevis,* 484 F.2d 1149 (5 Cir. 1973) (Petition for Certiorari pending). In the *Thevis* opinion, the Court of Appeals had declared, in the light of *Miller,* that the "utterly without redeeming social value" test and the national community standards test were no longer governing. The Court had recognized that the statute was required to define specific sexual conduct, but held that the statutory requirement could be satisfied by a judicial gloss.

The Court of Appeals also held that the failure of the Government to prove by competent evidence that the material here involved exceeded contemporary community standards or appealed to prurient interest or was utterly without redeeming social value did not invalidate the judgments of conviction. With respect to *scienter,* the Court held that "Proof that the defendants knew that the material was sexually oriented is sufficient."

## REASONS FOR GRANTING THE WRIT.

1. The judgments against the Petitioners herein are in direct conflict with cases decided in the Ninth, Tenth and First Circuits. *United States v. Henson,* unreported (9 Cir., No. 73-2063, October 5, 1973);[3] *United States v. Friedman,* 488 F.2d 1141 (10 Cir. 1974); *United States v. Palladino,* 490 F.2d 499 (1 Cir. 1974). In *Henson,* as in the case at bar, a judgment of conviction was rendered by utilizing the *Roth-Memoirs* test. In vacating the judgment of conviction, the Court said:

> "In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Sureme Court authorities existing at the time, principally, *Roth v. United States,* 354 U.S. 476 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which *some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.*" (Emphasis added).

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[3]A copy of the *Henson* Opinion is attached hereto as Appendix "D". The Government, in seeking rehearing, with a suggestion for a rehearing *en banc,* stated: "The opinion of the panel . . . must be read as holding that the obscenity test used at trial was repudiated by the Supreme Court in *Miller v. California* as unconstitutionally vague." (Govt. Pet. for Rehearing in *Henson,* 11). On December 3, 1973, the Court made an order in *Henson,* deferring action on the Government's petition for rehearing with suggestion for rehearing *en banc,* "pending the court's disposition of a number of cases now pending before the full court en banc, the disposition of which may affect the court's opinion in the subject case."

After vacating the judgment of conviction, the Court remanded the case to the District Court for reconsideration in light of this Court's decisions of June 21, 1973, and in light of *Stroud v. State*, 300 N.E.2d 100 (August 21, 1973), and *Mohney v. State*, 300 N.E.2d 66 (August 21, 1973), wherein the Indiana Supreme Court declared that State's obscenity statute unconstitutionally vague in light of this Court's June 21, 1973 decisons.

In *United States v. Friedman, supra*, the Court vacated an obscenity conviction and remanded to the District Court for a new trial. The Court stated that it was its view

> "that the several recent [obscenity] decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature. . . . These decisions . . . require a re-examination of the facts of this case together with the determination of what may be the applicable standards. . . . A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be." (488 F.2d at 1141-1142).

In *United States v. Palladino*, 490 F.2d 499 (1 Cir. 1974), the Court reversed a federal obscenity conviction which occurred prior to June 21, 1973. The Court stated that the "defendants are caught in a period of transition, their prosecutions having taken place before the Miller decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions." (490 F.2d at 500).

2. In light of *Miller v. California*, 413 U.S. 15, and the related cases, the federal criminal statute in-

volved herein, affecting First Amendment rights, was, prior to June 21, 1973, unconstitutionally vague for the following five reasons:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and nonexistent;

(c) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labeled "unrealistic";

(d) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

(e) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under §1461.

A. Prior to June 21, 1973, Section 1461 was unconstitutionally vague, because it failed to contain a description of the sexual conduct *Miller* held was con-

stitutionally mandated and the statute had not received a prior authoritative construction reading the necessary terminology into the statute. In *Miller* (93 S.Ct. at 2614-2615), the Court stated:

> ". . . State statutes designed to regulate obscene materials must be *carefully limited*. See *Interstate Circuit, Inc. v. Dallas, supra,* 390 U.S. at 682-685 (1968). As a result, we now *confine* the permissible scope of such regulation to works which depict or describe sexual conduct. That *conduct must be specifically defined by the applicable state laws, as written or authoritatively construed.*" (Emphasis added).

Subsequently, the Court said (93 S.Ct. at 2616):

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. . . ."

As aforesaid, the court below rejected Petitioners' vagueness attack on the statute herein by relying upon its prior decision in *United States v. Thevis,* 484 F.2d 1149. The Fifth Circuit there recognized that the statute under which Petitioners were convicted utilized vague standards, saying: "On its face, this statutory terminology ['obscene, lewd, lascivious or filthy'] does not contain the specifics required by *Miller. . . . Miller* requires that elements of the definition be a part of the statute." *United States v. Thevis, Peachtree News Co., Inc.,* 484 F.2d at 1155. The Court concluded however that the statute's deficiency could be saved by an

authoritative *retroactive* judicial construction. Thus, the Court said:

> ". . . [I]n *12 200-Ft. Reels, supra,* at fn. 7, the Court states that it is 'prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific "hardcore" sexual conduct given as examples in *Miller*. . . ' We believe that this answers the question and that the definition of *Miller* is a gloss properly added to §1462. . . ." (484 F.2d at 1155).

The lower court's reliance on *12 Reels of Film,* is, it is respectfully submitted, misplaced. When this Court stated that it was *prepared* to construe the vague terms "obscene, lewd, lascivious, filthy" in accordance with *Miller,* the Court made clear that prior to June 21, 1973, there had been no such authoritative construction. In *Louisiana v. Shreveport News Agency, Inc.,* 287 So. 2d 464 (S. Ct. La. 1973) the Court refused to read *Miller* into the Louisiana obscenity statute retroactively. The Louisiana obscenity statute, like Section 1461, used the general terms "obscene, lewd, lascivious," etc. In concluding that the Louisiana state obscenity statute was unconstitutional because it did not contain a description of the specific sexual conduct an obscenity statute must contain if it is to meet constitutional requirements, Justice Barham, speaking for the Court, said:

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.

"We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . .

"In United States v. 12 200 Ft. Reels of Super 8 mm. Film . . . the Chief Justice . . . stated in Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral', for the purpose of reviewing the constitutionality of the federal statutes . . . as being limited to 'specific-hard-core' sexual conduct given as examples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that Court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. . . ." (287 So. 2d at 468-469).

Even if the language in *12 Reels of Film* is more than pure *obiter dictum,* it certainly did not purport to have any retroactive effect. This Court has consistently held that the Judiciary is barred by the Due Process Clause from attempting to cure a vague statute by retroactive rulings, "either of the trial court or of the appellate court." The fundamental principle which requires a criminal offense to have existed when the conduct in issue occurred applies to bar "retroactive criminal prohibitions emanating from courts as well as from legislatures." *Bouie v. Columbia,* 378 U.S. 347, 353, 354. See, also, *Douglas v. Bouder,* 93 S.Ct. 2199.

B. Prior to June 21, 1973, Section 1461 was unconstitutionally vague, because the statute was authoritatively construed as requiring proof that charged materials offend national standards, which nationwide standards this Court found were unascertainable, unprovable and nonexistent.

In *Miller*, the Court held that in a *state* obscenity prosecution, a *statewide standard* was sufficient to meet constitutional requirements, and a national standard need not be applied. But in a federal obscenity case a national standard must be used, both because Congress so intended and because the Constitution probably requires it. See, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488.[4]

In *Miller*, Chief Justice Burger made it crystal clear that the federal and state standards were quite different by citing Justice Harlan's opinions in which he repeatedly argued for tight federal obscenity laws and looser state laws. (93 S.Ct. at 2620).

Mr. Justice Harlan announced the opinion of the Court in *Manual Enterprises, Inc. v. Day*, 370 U.S.

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[4]The Court on June 21, 1973 was mute on the question of whether nationwide standards are still required in federal obscenity prosecutions. In *United States v. Orito* (93 S.Ct. at 2679), the Court incorporated the portion of *Miller* appearing in 93 S. Ct. at 2614-2615, and in *United States v. 12 Reels of Film* (93 S.Ct. at 2670, n.7), the Court incorporated the portion of *Miller* appearing in 93 S.Ct. at 2615-2616. These page references relate solely to the kind of sexual conduct which might be reached under a valid obscenity statute. The discussion of local vs. national standards occurs at 93 S.Ct. at 2618-2620, where the Court said that state standards were constitutionally sufficient in a state prosecution.

In *United States v. Palladino*, 490 F.2d 499 (1 Cir. 1974), the court held that the utilization of "local" standards in a federal obscenity prosecution raised serious constitutional questions. Accordingly, that court adhered to its long-standing ruling that national standards must be utilized in federal criminal prosecutions.

478, 487, wherein he observed that "*Roth's* evident purpose [was] to tighten obscenity standards." In discussing the relevant "community" in terms of whose standards of decency the issue of obscenity must be judged, Justice Harlan said: "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." (370 U.S. at 488). In a footnote at the same page, Justice Harlan stated: "The 1958 amendments to 18 U.S.C. §1461, 72 Stat. 962, 18 U.S.C.A. §1461, authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national." See the testimony of Justice Rehnquist when he was Assistant Attorney General, Office of Legal Counsel, Department of Justice, at *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninety-First Congress, on H.R. 5171, H.R. 11009, H.R. 11031, H.R. 11032, and related measures, Serial No. 21* (pp. 37-38, 46-47), where Justice Rehnquist expressed the view that a federal obscenity statute *had* to utilize national standards.

Mr. Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, 93 S.Ct. 2628, n. 7, addressed himself to the different standards applicable in state and federal cases, saying:

> "On the question of community standards see also *Hoyt v. Minnesota*, 399 U.S. 524 . . . (Blackmun, J., joined by Burger, C.J., and Harlan, J., dissenting (flexibility for state standards);
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> *Cain v. Kentucky*, 397 U.S. 319 . . . (Burger, C.J., dissenting) (same); *Manual Enterprises v. Day*, 370 U.S. 478 . . . (Harlan, J., joined by Stewart, J.) (national standards in context of federal prosecution)."

Once it is recognized that 18 U.S.C. 1461, as applied to Petitioners herein, utilized a nationwide test, it becomes clear that the statute so applied is unconstitutionally vague. In *Miller*, the Court observed that our Nation is too big and too diverse for the Court to be able to articulate "a single formulation, even assuming the prerequisite consensus exists. To structure an obscenity prosecution around evidence of national community standards "would be an exercise in futility" (413 U.S. at 30). The Court found nothing in the First Amendment that requires a jury to consider "*unascertainable* 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." (413 U.S. at 31-32) (emphasis added). In *Miller*, the Court cited with approval Chief Justice Warren's observations in *Jacobellis v. Ohio*, 378 U.S. 184, 200, that "there is no provable 'national standard'. . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

C. Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged materials appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labeled "unrealistic."

In *Miller*, the Court stated that under *Memoirs* a national standard of First Amendment protection enumerated by a plurality of this Court had to be used in determining what appeals to the "prurient interest." (413 U.S. 15, 30). But in *Miller*, the Court rejected, for the future, the use of national standards in determining appeal to prurient interest, saying there are no

> "fixed uniform national standards of . . . what appeals to the 'prurient interest'. . . . When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation."

D. Prior to June 21, 1973, Section 1461 was unconstitutionally vague, because it utilized an unworkable and ambiguous test—the "utterly without redeeming social value" test.

In its opinion in *United States v. Thevis*, 484 F.2d 1149, the Court of Appeals stated that *Miller* did not "indicate" that *Memoirs* was unconstitutionally vague, but rather that the Court was dissatisfied with *Memoirs* "because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution" (484 F.2d at 1154). With all respect, Petitioners suggest *Miller* did "indicate" that *Memoirs* was unconstitutionally vague. *Memoirs* was rejected precisely because of its unworkability—its vagueness. Chief Justice Burger spoke of the "intractable obscenity problem" (*Miller*, 93 S.Ct. at 2610). Quoting Justice Harlan, the Court wondered if the " 'utterly without redeeming social value' test had any meaning at all"

(93 S.Ct. at 2613). The Court pointed to the "variety of views among the members of the Court unmatched in any other course of constitutional adjudication" (93 S.Ct. at 2614). The *Memoirs* test, the Court said, has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation" (93 S.Ct. at 2614).

The Court in *Thevis* asserted that the *Memoirs* test was not unconstitutionally vague because *Miller* stated that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." (484 F.2d at 1154). What Chief Justice Burger had in fact stated in that regard was that "*a 'national' standard of First Amendment protection* enumerated by a plurality of this Court was correctly regarded at the time of trial as limiting state prosecution under controlling case law" (93 S.Ct. at 2618) (emphasis added). In stating that a national standard was required prior to June 21, 1973, the Chief Justice was not saying that the national standard test was sufficiently specific to meet the requirements of due process. On the contrary, Chief Justice Burger stated that there was no ascertainable national standard. A standard that is not ascertainable is plainly vague and, hence, unconstitutional.

E. Prior to June 21, 1973, Section 1461 was so vague, ambiguous and unworkable that this Court was required to adopt the *Redrup* approach of deciding each case on an *ad hoc* basis, without attempting to offer guidance to those subject to the provisions of the statute.

In *Miller*, Chief Justice Burger said that in view of the unworkability of the *Roth-Memoirs* test

> "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup 'policy.'* See *Walker v. Ohio*, 398 U.S. 434, 434-435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." (93 S.Ct. at 2614, n. 3).

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, 93 S.Ct. at 2647, made the same point, saying: "In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York*, 386 U.S. 767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the court, appealing their separate tests, deemed not to be obscene." After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court

> "resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively

> obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (93 S.Ct. at 2647).

Our Constitution, of course, requires fair notice so that the law-abiding can conform their conduct to the requirements of the law. But how was the Petitioner, a law-abiding citizen, to know what publications dealing with sex would be found obscene by five of the Justices "subjectively judging" the publications "applying their separate tests?" If judges, attempting to follow this Court's lead conscientiously, "have often ended in hopeless confusion," was not Petitioner's plight even more hopeless?

In *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, this Court said:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

In the case at bar, Petitioner, a law-abiding citizen, and an innocent man, has been trapped by being convicted under a statute which no man, not even the most learned Justice, can understand.

3. In light of this Court's decisions of June 21, 1973, the Indictment herein is fatally defective, because it fails to inform Petitioners of the nature and cause of the accusations against them, in violation of the Sixth Amendment.

In *United States v. Orito,* 93 S.Ct. 2674, 2679, this Court vacated the judgment of the District Court and remanded the case

> "for reconsideration of the *sufficiency of the indictment* in light of *Miller v. California, supra; United States v. Twelve 200-Ft. Reels, supra,* and this opinion." (Emphasis added).

The necessity of examining the sufficiency of the Indictment herein flows naturally from this Court's recognition that neither the words of the statute alone ("obscene, lewd, lascivious, filthy") nor the gloss put on these words by *Roth-Memoirs* gave sufficient notice of the offense charged. In the case at bar, the sole charge in the Indictment is that Petitioners mailed "obscene, lewd, lascivious or filthy" films and advertisements. Petitioners duly moved to dismiss the Indictment on the ground that it failed to specify the elements constituting "obscenity" and *scienter* [R.T. 140-142].

In the decisions of June 21, 1973, the Court was unanimous on one point, and one point only—that the *Roth-Memoirs* test had failed to give adequate guidance as to what publications were criminal and what publications were unconditionally protected by the free speech and press provisions of the First Amendment. The *Roth-Memoirs* test was rejected as unworkable and unsupported by any member of the Court. The confusion surrounding this "legal term of art" was explored by the Fifth Circuit in *United States v. Groner,* both by the panel (475 F.2d 550 [5 Cir. 1972]) and by the court *en banc* (479 F.2d 577 [5 Cir. 1973]). Judge Clark commented on the Court's failure to give "the respective limits of 'free press' rights under

the First Amendment and unprotected publications which exploit sexuality," stating that "the judiciary has created a quagmire" (475 F.2d at 559). Judge Gewin, speaking for the majority of the *en banc* court, stated that the familiar *Roth-Memoirs* test "represents an amalgam of the individual views of members and former members of the Supreme Court, taken from their respective concurring or dissenting opinions in *Roth* and subsequent decisions involving obscenity." (479 F.2d at 580). He concluded that the *Roth-Memoirs* test "is not the prevailing test" (479 F.2d at 580). In overruling the panel's decision in *Groner*, Judge Gewin stated: "[I]t is apparent that the panel opinion was decided on an erroneous view of the test to be applied in determining obscenity. Neither the 'patent offensive' nor the 'utterly without redeeming social value' elements are included in the test laid down by the Supreme Court, nor is the community national in scope." (479 F.2d at 583). Judge Ainsworth (joined by Judges Gewin, Bell, Coleman, Dyer, Clark, Ingraham and Ronney) recognized that "accurate guidelines . . . based on past decisions of the Supreme Court, are hard to find." (479 F.2d at 586).

Moreover, in the Fifth Circuit's decision in *United States v. Thevis*, 484 F.2d 1149, the Court recognized that the statutory terminology "obscene, lewd, lascivious and filthy" "does not contain the specifics required by *Miller*" and that "*Miller* requires that elements of the definition be a part of the statute" (484 F.2d at 1155). Nevertheless, the Fifth Circuit concluded that the statutory deficiencies "can be satisfied by a judicial gloss," (484 F.2d at 1154, 1155) and that this subsequently imposed judicial gloss could appropriately be

read into indictments retroactively. Yet, in the light of *Miller*, it cannot be said that the words "obscene, lewd, lascivious, indecent, filthy and vile," standing by themselves in an indictment, afford the requisite "fair notice" and "concrete guidelines" required by the Constitution.

*Russell v. United States*, 369 U.S. 749, is the leading case dealing with the sufficiency of an indictment in a federal prosecution. *Russell* holds that in an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute*, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished: (369 U.S. at 765-766). See also, *United States v. Carll*, 105 U.S. 611, 612. In light of the tortured and unsuccessful efforts of this Court and other courts to define "obscene, lewd, lascivious and filthy," it must be conceded by all that those words, standing alone, fail to set forth "all the elements necessary to constitute the offense" intended to be punished by §1461. In *Russell*, the Court explored the purpose served by a grand jury indictment in the administration of federal criminal law, concluding that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation," and that "the constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury had first intervened reflects centuries of antecedent development of common law" (369 U.S. at 761).

Where, as here, guilt or innocence depends so crucially upon the meaning given to the words "obscene, lewd, lascivious or filthy," the Indictment must do more than simply repeat the vague language of that criminal statute. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. . . . An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation made against him . . . is defective, although it may follow the language of the statute." (369 U.S. at 765). The Court noted that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure. . . ." (369 U.S. at 765-766). Where, as in the case at bar, the statutory language does not encompass all the elements of the offense, an indictment which merely repeats the statutory language requires the accused

> "to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of his conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion . . . to condemn such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S. 196, 201, 202." (369 U.S. at 766).

This principle has special application to obscenity prosecutions, where uncertainty as to the meaning of the term "obscene" has characteristically infected criminal proceedings under Section 1461. As the Court said in *Russell:*

> "Difficult and doubtful questions are inherent in the judicial process, particularly under a system of criminal law which places heavy emphasis upon the protection of the rights and liberties of the individual. . . . [A] proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum . . . . [T]he repeated appearance in prosecutions under a particular criminal statute of the same critical and difficult question, which could be obviated by a simple averment in the indictment, invites inquiry into the purposes and functions which a grand jury indictment is intended to serve." (369 U.S. at 760).

In *Russell,* the Court stated that at every stage in the criminal proceeding the accused "was met with a different theory, or by no theory at all. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." (369 U.S. at 769), and spoke of the difficulties and uncertainties which the federal trial and reviewing courts had in dealing with cases arising under the statute there involved. "Viewed in this context," the Court said the rule that an indictment must

contain more than mere statutory language "is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." (369 U.S. at 769). Federal trial courts and reviewing courts have had even greater difficulties and uncertainties in dealing with cases arising under Section 1461.

In the case at bar, we have no clarifying bill of particulars. In any event, *Russell* teaches us that a bill of particulars cannot save an invalid indictment.

> "To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." (369 U.S. at 770).

In *United States v. Vuitch*, 402 U.S. 62, the trial court dismissed an indictment charging the commission of an abortion, on the ground that the statute was unconstitutionally vague. This Court reversed, concluding that the statute, properly construed, was not unconstitutionally vague. The Court stated however, that under the statute "the burden is on the prosecution to *plead and prove* that an abortion was not 'necessary for the preservation of the mother's life or health.'" (402 U.S. at 71) (Emphasis added).

In *Rabe v. Washington*, 405 U.S. 313, the Court held that a state obscenity statute, construed as prohibiting the showing of a sexually oriented movie in a drive-in theatre, which movie might be exhibited to adults in an indoor theatre with impunity, was impermissibly vague for failure to give the accused fair notice that criminal liability was dependent upon the place where the film was shown. Chief Justice Burger, joined by Justice Rehnquist, concurred, saying:

> ". . . That this record shows an offensive nuisance that could properly be prohibited, I have no doubt, but the state statute and *charge did not give the notice constitutionally required.*" (405 U.S. at 317). (Emphasis added).

Circuit and District Courts have uniformly invalidated indictments containing ambiguities less gross than those found in the case at bar. See, *United States v. Leonard*, 455 F.2d 949, 950 (9 Cir. 1972); *United States v. Fiorito*, 465 F.2d 431, 432 (7 Cir. 1972); *Nelson v. United States*, 406 F.2d 1136 (10 Cir. 1969); *United States v. Beard*, 414 F.2d 1014 (3 Cir. 1969); *United States v. Little*, 317 F.Supp. 1308 (D.C. Del. 1970); *United States v. Farinas*, 299 F.Supp. 852 (D.C. N.Y. 1969); *United States v. Schneiderman*, 102 F.Supp. 87 (D.C. Cal. 1951).

The central fact that emerges from the June 21, 1973 decisions is that the statutory language of Section 1461, and the gloss put on that language by *Roth-Memoirs*, failed to give Petitioners the constitutionally required notice. The Indictment, which merely repeated the defective statutory language was, therefore, fatally infirm.

4. The court below held that "Proof that the defendants knew that the material was sexually oriented is

sufficient" to satisfy the *scienter* requirement in federal obscenity prosecutions. The issue raised by this ruling is one of substantial importance which has not been, but should be, decided by this Court.

In *Roth v. United States,* 354 U.S. 476, the Court emphasized that the ambiguities of the standards for judging obscenity could not be reconciled with the due process guarantees of fair notice without proof of guilty knowledge and specific intent. See, cases cited in *Roth,* 354 U.S. at 491-492, and repeated in *Miller v. California,* 93 S.Ct. at 2617, n.10.

In *Smith v. California,* 361 U.S. 147, the Court held that it was constitutionally impermissible to dispense entirely with the element of *scienter* in an obscenity prosecution. Justice Brennan, writing for the Court, stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U.S. at 154).[5]

[5]Justice Black agreed that the ordinance could not penalize a bookseller, even though he was not aware of its "obscenity" (361 U.S. at 156). Justice Frankfurter understood the Court's opinion as holding that one could not be accused of violating the obscenity law unless he was charged with "knowledge of the obscenity" (361 U.S. at 161). See, the opinion of Justice Harlan in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 492-493, and fn. 16. See also, *New York Times Co. v. Sullivan,* 376 U.S. 254, 278-279.

In *Mishkin v. New York*, 383 U.S. 502, the Court approved a construction of the state obscenity statute which required proof that the accused was in some manner aware of the "character" of the material, together with proof of "calculated purveyance" of the alleged obscene material (383 U.S. at 510). At the same time, the Court rejected a standard which would require mere proof of "knowledge of the contents of the books" (383 U.S. at 510, fn.9). Again the Court reiterated that it was not yet prepared to define what sort of mental element was requisite to a constitutionally permissible obscenity prosecution (383 U.S. at 511), but the Court emphasized that the Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for "the ambiguities inherent in the definitions of obscenity" (383 U.S. at 511).[6]

In *Redrup v. New York* and *Austin v. Kentucky*, 386 U.S. 767, certiorari was granted in both cases, limited solely to those questions which presented the issue of *scienter* in the petitions. In the *per curiam* decision which followed, however, the Court decided that the material involved in the cases was not "obscene," the decision being made "without prejudice to the questions upon which review was originally granted." *Redrup v. New York* [*Austin v. Kentucky*], 386 U.S. 767, 770. In his dissent, Justice Harlan noted that in *Smith v. California* a defendant criminally charged "with purveying obscene material must be shown to have had some kind of knowledge of the

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[6]The Indictment here did not allege Petitioners' knowledge of the character of the advertisements and films, and Petitioners argued that this rendered the Indictment constitutionally inadequate.

character of such material; the quality of that knowledge, however, was not defined," and Justice Harlan expressed regret the Court had not "come to grips with such issues" (386 U.S. at 771-772).

One is not ordinarily guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Ignorance or mistake of fact negatives the existence of a *mens rea.* Moreover, mere proof of knowledge will not be sufficient unless such knowledge is accompanied by an intent to do the acts which constitute the harm against which the law is directed. Both knowledge and intent must exist before *scienter* can be deemed proven. Knowledge is the foundation of intent; without the knowledge the intent cannot exist. *United States v. Falcone,* 311 U.S. 205. The ordinary criminal law also requires, in many cases, proof of a specific intent, that is, proof of an act done with a bad purpose. See, *Screws v. United States,* 325 U.S. 91; *Dennis v. United States,* 341 U.S. 494, 499.

Every obscenity prosecution implicates First Amendment questions, and therefore the standards for judging *scienter* in such prosecutions require more critical analysis than exist in the ordinary criminal case. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser v. Randall,* 357 U.S. 513, 520. Stricter standards governing proof of *mens rea* and specific intent are required in the enforcement of statutes which affect the exercise of the freedoms of speech and press; this in order to

avoid the constitutional infirmities which lurk in statutes involving First Amendment rights, and also to preserve the community's right to know which may be seriously affected by the chilling effect and self-induced censorship engendered by laws and prosecutions thereunder which fail to provide exacting standards for judging *scienter*.

As aforesaid, the court below held that mere proof of knowledge that the material was "sexually oriented" was sufficient to establish the requisite *scienter* in an obscenity prosecution. The Court declined to enunciate any other standard, disregarding decisions rendered by this Court which cast a far different light on the importance of maintaining the rights guaranteed by the First Amendment against subtle erosions created by vague and ambiguous statutes and the elimination of strict *scienter* requirements. Thus, the court below did not even require proof of an intent by an accused to commit a public wrong, or proof of knowledge of those operative facts which bring an obscenity statute into play, or proof of knowledge of the alleged obscene character of the material, or reckless disregard of whether or not the material was obscene. Yet such decisions of this Court as *Smith v. California*, 361 U.S. 147; *New York Times Co. v. Sullivan*, 376 U.S. 254, and the *Miller* quintet of decisions rendered on June 21, 1973, make it clear that mere proof of knowledge of the "sexual orientation" of an advertisement or film cannot be deemed to be equivalent of proof of guilty knowledge under the statute and the Constitution.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "sexual orientation"

of a film or advertisement is to impose the absolute criminal liability condemned by this Court in *Smith v. California.* Sex and obscenity are not synonymous, and knowledge of the "sexual orientation" of an advertisement or film dealing with sex plainly cannot be the equivalent of knowledge of the obscene character of the material. Mere proof that a publisher or distributor knew the sexual orientation of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts, plainly fails to establish that such publisher or distributor knew the alleged obscene character of the material. See, for example, *Grove Press, Inc. v. Gerstein,* 378 U.S. 577; *Weiner v. California,* 404 U.S. 988; *Burgin v. South Carolina,* 404 U.S. 806; *Hartstein v. Missouri,* 404 U.S. 988.

It follows, therefore, that mere proof of knowledge of "sexual orientation" cannot be the standard for judging *scienter* since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury or trial judge would be left free to presume guilty knowledge under the federal obscenity statute by their own subjective predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in criminal prosecutions, particularly involving speech and press. *Bailey v. Alabama,* 219 U.S. 219; *Tot v. United States,* 319 U.S. 463; *Speiser v. Randall,* 357 U.S. 513. Such an arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected ma-

terial. *Smith v. California*, 361 U.S. 147; *New York Times Co. v. Sullivan*, 376 U.S. 254.

If an accused may be convicted without any proof that he knew that the material was obscene in nature, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury becomes meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms. The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered untenable by the decisions of this Court since *Roth*, through *Jacobellis*, *Memoirs*, *Ginzburg*, *Redrup*, *Stanley*, and the June 21 decisions, as well as by the changing social conditions, attitudes, and "sexual revolution" (*Miller v. California*, 93 S.Ct. at 2621) of the past decades. See, *Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438; *Doe v. Bolton*, 93 S.Ct. 739; *Roe v. Wade*, 93 S.Ct. 705; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965); *In re Winship*, 397 U.S. 358; *United States v. Vuitch*, 402 U.S. 62; and *The Report of the Commission on Obscenity and Pornography*, September 1970.

It is submitted, therefore, that the judgments of conviction herein are constitutionally infirm because the

standard for judging *scienter,* based solely on knowledge of "sexual orientation," does violence to the guarantees of the free speech and press and due process clauses of the First and Fifth Amendments.

5. The trial court's instructions to the jury respecting *scienter* were confusing, inconsistent, misleading, and permitted the jury to return verdicts of guilt based upon a standard for judging *scienter* that fails to satisfy the requirements of the First and Fifth Amendments.

As noted heretofore, Petitioners at the opening of the trial were not informed either by the Indictment or by a bill of particulars as to whether they were charged with intentionally mailing or causing to be mailed obscene material; or charged with intentionally mailing or causing to be mailed allegedly obscene material, knowing solely the contents of the said material; or charged with intentionally mailing or causing to be mailed alleged obscene material, knowing solely that the material dealt with sexual matters; or charged with intentionally mailing or causing to be mailed allegedly obscene material, knowing the obscene character of said material, and with the specific intent to appeal to prurient interest.

In the opening statement by counsel for the Government, counsel related to the jury what he conceived to be the elements of the offenses charged:

> "The first is that the defendants wilfully deposited or caused to be deposited in the mail items declared non-mailable by statute.
>
> "Secondly, that the two defendants—the individual and the corporation—had scienter or what the law calls guilty knowledge of the nature of the contents of the items charged to be non-mailable." [R.T. 15].

In its instructions to the jury, the trial court first stated that the Indictment charged the Petitioners with "knowingly" using the mails and "knowingly" causing to be delivered by mail certain obscene matter [R.T. 88-89]. The trial court next quoted to the jury the following language from Title 18 U.S.C. 1461:

> "Whoever *knowingly* uses the mails for the mailing, carriage in the mail or delivery of anything declared to be non-mailable or *knowingly* causes to be delivered by mail, according to the direction thereon shall be guilty of an offense against the laws of the United States." [R.T. 90] (Emphasis added).

The trial court then instructed the jury that "three essential elements are required to be proved in order to establish the offense charged in the Indictment." [R.T. 90-91]. First, that the materials charged are obscene:

> "Second that the accused *wilfully* deposited or caused to be deposited an envelope containing such obscene picture or pictures for mailing and delivery by the post office establishment of the United States; and, third, that the accused had *knowledge that the envelope contained such obscene picture or pictures* at the time the envelope was deposited for mailing and delivery." [R.T. 91] (Emphasis added).

The Court repeated a number of times that the charge was that the Petitioners had acted "wilfully" [R.T. 92, 95].

Having charged the jury that both the Indictment and the statute (Title 18 U.S.C. 1461) only used the word "knowingly," but that an "essential element" [R.T. 90]

and the "gist" [R.T. 91] of the offense is the "wilful" misuse of the mails, the trial court then proceeded to define both "knowingly" and "wilfully" as follows:

> "The word 'knowingly' means that the act was done voluntarily and intentionally and not because of mistake or accident.
>
> "The word 'wilfully' means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law." [R.T. 96].

The instructions of the trial court with respect to *scienter* thus were confusing, inconsistent and misleading. See, *Bollenbach v. United States,* 326 U.S. 607, 613-614. Considered in their entirety, the instructions left the jury free to treat the offenses charged as requiring either general intent or specific intent. The instructions were sufficiently ambiguous and inconsistent as to permit the jury to convict even if the proof showed no more than that the Petitioners acted with knowledge of the contents of the material mailed, or knew generally that the material mailed was related to sexual matters. Yet the applicable law as previously discussed and the theory of the defense plainly was that, whether or not the Petitioners knew the "sexual orientation" of the matter mailed, they did not know the matter to be obscene in nature nor did they act with bad purpose and intent to disobey the law [R.T. 19-20, 63-72]. Where a criminal statute requires guilty knowledge and specific intent, it is error to charge the jury in terms of general intent, *i.e.,* that the act was merely done knowingly or voluntarily, as distinguished from accidentally. *United States v. Murdock,* 290 U.S. 389; *Hargrove v. United*

*States*, 67 F.2d 820 (5 Cir. 1933). A conviction must be reversed where, from the court's instructions, it cannot be said that the jury did not return its verdict based upon an unconstitutional standard. *Stromberg v. California*, 283 U.S. 359; *Terminiello v. Chicago*, 337 U.S. 1. As discussed above, the Constitution requires proof of guilty knowledge and specific intent, not mere general intent. See, *Gagliardo v. United States*, 366 F. 2d 720 (9 Cir. 1966).

6. The conduct alleged in the Indictment herein occurred in 1970 and 1971. The Indictment was returned in July, 1971 [R.T. 117]; the trial was conducted and the verdicts returned in September, 1971. At the trial, the Government made no attempt to prove that the advertisements and films herein involved exceeded contemporary community standards in the Nation as a whole in the depiction or representation of sex, nor any attempt to prove that the said materials appealed to the prurient interest of the average person or of any clearly identifiable deviant group, nor any attempt to prove that the material was utterly without redeeming social value or importance.

The contention made by Petitioners below that the Government had failed to adduce any competent evidence of the essential elements of the offenses charged in the Indictment, was dismissed by the court below with the mere observation that "The Government does not have to introduce expert testimony in addition to the challenged material to prove the obscenity charge." Petitioners submit that the court below misconceived the issue presented and reached a constitutionally impermissible result.

The trial in the case herein was conducted under the theory that the standards for judging the alleged

obscenity of the material were those enunciated by this Court in *Memoirs v. Massachusetts,* 383 U.S. 413, 418. Thus the obligation rested upon the prosecution to prove beyond a reasonable doubt three essential elements of the offense, to wit, that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; (c) the material is utterly without redeeming social value.

As this Court noted in *Miller* (93 S.Ct. at 2618-2620) a national standard of First Amendment protection limited both federal and state prosecutions under controlling case law at the time when the trial herein was conducted. In the area of federal prosecutions, it was recognized that the plain intent of Congress in the enactment of federal obscenity statutes was the requirement that the alleged obscenity of publications be measured by a national standard. This was the view of Justice Harlan from *Roth* through *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 488, n.10, and *Memoirs,* 383 U.S. at 458. In *Miller,* the Chief Justice, writing for the majority, noted the past opinions of Justice Harlan and the concurring views of Justice Blackmun on this issue. Moreover, under *Memoirs,* the prosecution, in order to prove obscenity, was required to affirmatively establish that the material was "utterly without redeeming social value." *Miller v. California,* 93 S.Ct. at 2613.

As heretofore stated, the Government made no attempt to prove the aforesaid essential elements of the offense. See, *In re Winship,* 397 U.S. 358; and *Memoirs v. Massachusetts,* 383 U.S. 413. Nevertheless, the Peti-

tioners here were convicted on the theory that the essential elements of the offense were those enunciated in *Memoirs*. This Court, however, described the *Memoirs* national standard test as "unrealistic" and "an exercise in futility." The national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable," and "neither realistic nor constitutionally sound." 93 S.Ct. at 2618-2620. With respect to the "utterly without redeeming social value" test, this Court described the test as imposing a "burden virtually impossible to discharge under our criminal standards of proof." 93 S.Ct. at 2613.

In short, the Petitioners here were convicted without proof of the essential elements of the offense and under standards which this Court has held are unconstitutional and virtually impossible to establish. To convict an accused without proof of guilt and under palpably unconstitutional and unlawful standards is to deprive the accused arbitrarily and capriciously of his liberty without the slightest semblance of due process of law. *Thompson v. City of Louisville*, 362 U.S. 199; *Tot v. United States*, 319 U.S. 463; *DeJonge v. Oregon*, 299 U.S. 353; *Cole v. Arkansas*, 333 U.S. 196; *Rabe v. Washington*, 405 U.S. 313; *In re Winship*, 397 U.S. 358.

7. The advertisements and films herein were entitled to constitutional protection when the alleged offenses occurred and at the time the judgments of conviction were rendered. The materials were entitled to constitutional protection under the prior decisions of this Court and, indeed, the decisions of this Court rendered on June 21, 1973 support this conclusion. The materials herein do not substantially exceed the candor of those held entitled to constitutional protec-

tion in such cases as *Wiener v. California,* 404 U.S. 988; *Burgin v. South Carolina,* 404 U.S. 806; and *California v. Pinkus,* 400 U.S. 922.

As heretofore discussed, if under the *Memoirs* standards, "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment" (93 S.Ct. at 2614, n.3), then it is respectfully submitted the Petitioners could not be fairly charged with knowing that the materials herein were without constitutional protection in the light of the multifold rulings made by the Court with respect to comparable material.

8. The court below concluded that the advertisements and films herein offended both the *Memoirs* and *Miller* standards (June 21, 1973), and adjudged that the convictions could be upheld. Such ruling offends not only the free speech and press and due process guarantees of the Constitution, but the principles of fair notice and protection of an accused from retroactive application of unforeseeable judicial statutory construction.

Insofar as the *Memoirs* standards are concerned, as hereinbefore discussed, none of the materials are obscene in the light of the record herein.

Insofar as the *Miller* standards are concerned, Petitioners' convictions have been affirmed under a statute with a meaning quite different from the one they were charged with violating. The statute as construed is impermissibly vague as applied to Petitioners because of its failure to provide fair notice that criminal liability was dependent upon the unknown specified

sexual conduct, or upon some standards other than national, or upon a standard other than "utterly without redeeming social value." *Rabe v. Washington,* 405 U.S. 313. The Petitioners were charged and tried solely under the *Memoirs* standards. It has been repeatedly held by this Court that conviction upon a charge not made, or upon a theory not tried, is a sheer denial of due process of law. *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196.

Furthermore, the court below manifestly read into the law conduct not previously proscribed and which, in addition, altered the legal rules of evidence, permitting less and different testimony than the law required at the time of the commission of the alleged offense. See *Bouie v. Columbia,* 378 U.S. 347. This Court recently stated, in *Douglas v. Buder,* 93 S.Ct. 2199, 2200-2201:

> ". . . We held in Bouie that '[w]hen . . . [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."

The action of the court below is tantamount to an amendment of the Indictment herein, contrary to constitutional commands. The Indictment so amended would no longer be the accusation made by the Grand Jury which returned it. *Ex parte Bain,* 121 U.S. 1, 10, 13.[7]

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[7]The Court granted certiorari in *Hamling v. United States,* October Term 1973, No. 73-507, in which the questions presented were virtually identical to those presented herein. *Hamling* was argued on April 15, 1974.

**Conclusion.**

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

STANLEY FLEISHMAN,
*Attorney for Petitioners Antar A. R. Sulaiman and Over 21 Book Club, Inc.*

SAM ROSENWEIN,
DAVID M. BROWN,
FLEISHMAN, MCDANIEL, BROWN & WESTON,
a Professional Corporation,
*Of Counsel.*

## APPENDIX A.

United States of America, Plaintiff-Appellee, v. Antar A. R. Sulaiman, and Over 21 Book Club, Inc. Defendants-Appellants. No. 71-3145.

United States Court of Appeals, Fifth Circuit. Feb. 19, 1974.

Defendants were convicted in the United States District Court for the Southern District Court of Florida, William O. Mehrtens, J., of knowingly using mails for delivery of obscene advertisements and motion picture films, and they appealed. The Court of Appeals held that advertisements and films mailed by defendants were obscene either under test in effect at time of prosecution or subsequently announced test.

Affirmed.

Stanley Fleishman, Hollywood, Cal., Joseph Pardo, Miami, Fla., for defendants-appellants.

Robert W. Rust, U.S. Atty., George A. Kolus, Asst. U.S. Atty., Miami, Fla., Donald H. Feige, Crim. Div., Dept. of Justice, Robert D. Keefe, Dept. of Justice, Washington, D.C. for plaintiff-appellee.

Before TUTTLE, GEWIN and RONEY, Circuit Judges.

PER CURIAM:

This obscenity case, in conjunction with two others being decided today by this panel,[1] arises from convictions obtained prior to the "*Miller* quintet" and our recent decisions in light thereof.[2] The appeals were held

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[1]United States v. New Orlens Book Mart, 490 F.2d 73 (5th Cir. 1974) [No. 71-2594]; United States v. Thevis, 490 F.2d 76 (5th Cir. 1974) [No. 72-2664].

[2]Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93

(This footnote is continued on next page)

pending the Supreme Court's disposition of *Miller*. Virtually every point made on this appeal is now controlled by these recent decisions adversely to appellants. We affirm.

Antar Sulaiman and the Over 21 Book Club, Inc. were convicted under 18 U.S.C.A. § 1461 for knowingly using the mails for delivery of obscene advertisements and motion picture films to certain individuals.

[1] (1) The Government does not have to introduce expert testimony in addition to the challenged material to prove the obscenity charge. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), citing with approval United States v. Groner, 479 F.2d 577 (5th Cir. 1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

[2] (2) Defendants' knowledge that the material mailed is legally obscene is not required to prove a violation of 18 U.S.C.A. § 1461. Proof that the defendants knew that the material was sexually oriented is sufficient. United States v. Millican, 487 F.2d 331 (5th Cir. 1973). *See* United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973) (18 U.S.C.A. § 1462).

[3] (3) Title 18 U.S.C.A. § 1461 is not unconstitutionally vague or overbroad. United States v. Cote, 485 F.2d 574 (5th Cir. 1973). *See* United States v. Millican, 487 F.2d 331 (5th Cir. 1973).

In addition to urging the nonworkability of a national standard in conjunction with the *ex post facto* effect

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S.Ct. 2628, 37 L.Ed.2d 446 (1973); Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); United States v. Millican, 487 F.2d 331 (5th Cir. 1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

of applying the *Miller* standards to this case, an argument which we answered adversely to defendants today in United States v. New Orleans Book Mart, 490 F.2d 73 (5th Cir. 1974) [No. 71-2594], they urge that the local community standard test enunciated in *Miller* does not apply to federal obscenity prosecutions. Defendants premise their argument on the fact that *Miller* was a state obscenity prosecution. This contention, however, was answered adversely to them in United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973):

> In *Orito*, supra, and *12 200-Ft. Reels*, supra, the Court made clear that this standard also applies to prosecutions under federal statutes. 484 F.2d at 1154.

In reply to *Thevis* and the intimations of United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed. 2d 513 (1973) (18 U.S.C.A. § 1462), and United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973) (19 U.S.C.A. § 1305), the defendants cite to what they term the prospective language of Footnote 7 in *Twelve 200-Ft. Reels*, 413 U.S. at 130, 93 S.Ct. 2665, and argue that local community standards are to be given prospective application only and cannot be the basis for a conviction had prior to June 21, 1973.

[4] Relying on United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973), however, we need not answer that question. We have reviewed the material under both the *Memoirs* and *Miller* tests and find the advertisements and films to be within the legal parameters of obscenity.

Affirmed.

**APPENDIX B.**

United States Court of Appeals
Fifth Circuit
Office of the Clerk
April 3, 1974
600 Camp Street
New Orleans, La. 70130

EDWARD W. WADSWORTH
Clerk

TO ALL COUNSEL OF RECORD
Re: No. 71-3145—U.S.A. v. Sulaiman, et al.

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk
/s/ By Susan LeBrun
Deputy Clerk

cc: Mr. Stanley Fleishman
Mr. Joseph Pardo
Mr. George A. Kolus
Mr. Donald H. Feige &
Mr. Robert D. Keefe

## APPENDIX C.

### Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

   "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

3. The pertinent provisions of the Sixth Amendment are:

   "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

4. The pertinent provisions of Article I, §9 are:

   "* * * No . . . ex post facto Law shall be passed. * * *"

5. The pertinent provisions of Title 18 U.S.C., §1461, are:

   "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—. . .

   "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made.

   "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter." (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§1, 2, 69 Stat. 183; Aug. 28, 1958, Pub.L. 85-796, §1, 72 Stat. 962.)

## APPENDIX D.

### Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Thomas Venest Henson aka Tom Vinnie Henson, George Victor Abisalih aka George Abbey, dba "Associated Theaters of Texas", Appellants. No. 73-2063.

Appeal from the United States District Court for the Central District of California.

Before: ELY and GOODWIN, Circuit Judges, and MURRAY, District Judge.*

PER CURIAM:

In an indictment consisting of two counts and filed on January 10, 1973, the appellants were charged with having transported obscene material in interstate commerce, a violation of 18 U.S.C. § 1462. Their trial before a jury commenced on March 13, 1973, and was concluded on April 2, 1973, when the jury returned verdicts of guilty as to each appellant on both counts of the indictment. In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated

*Honorable William D. Murray, Senior United States District Judge, Butte, Montana, sitting by designation.

and in which some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.

In the light of the Supreme Court's decisions of June 21, 1973, hereinafter cited, the judgments of conviction must be, and they hereby are, vacated. The cause is remanded to the District Court for reconsideration in the light of *Miller v. California,* ..... U.S. ....., 41 U.S.L.W. 4925 (June 21, 1973); *Paris Adult Theatres I v. Slaton,* ..... U.S. ....., 41 U.S.L.W. 4935 (June 21, 1973); *United States v. Orito,* ..... U.S. ....., 41 U.S.L.W. 4956 (June 21, 1973); *Kaplan v. State of California,* ..... U.S. ....., 41 U.S.L.W. 4958 (June 21, 1973); *United States v. 12 200-Ft. Reels of Super 8 mm Film,* ..... U.S. ....., 41 U.S.L.W 4961 (June 21, 1973). *See Stroud v. State,* ..... Ind. ....., 300 N.E. 2d 100 (Aug. 21, 1973); *Mohney v. State,* ..... Ind. ....., 300 N.E. 2d 66 (Aug. 21, 1973).

SO ORDERED.

United States Circuit Judges
United States District Judge